No. 97-873

In the Supreme Court of the United States

OCTOBER TERM, 1997

UNITED STATES OF AMERICA, PETITIONER

v.

ALOYZAS BALSYS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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Respondent's essential contention (Resp. Br. 2-8) is that the role of the Self-Incrimination Clause in protecting individual privacy and dignity dictates that its coverage be extended to fears of prosecution in a foreign land. An examination of the constitutional text, past interpretations of the privilege, and the underlying purposes and law-enforcement interests at stake confirms, however, that the protection of the Self-Incrimination Clause is limited to fears of domestic prosecution.

A. Text, History, And Precedent Do Not Justify Extension Of The Self-Incrimination Clause To Fears Of Foreign Prosecution

1. Respondent and his amici argue that fears of foreign prosecution are necessarily embraced by the text of the Self-Incrimination Clause of the Fifth

Amendment, because the Clause refers to "any criminal case" rather than to "any *domestic* criminal case." National Association of Criminal Defense Lawyers (NACDL) *et al.* Amici Br. 3; Resp. Br. 8. The implication of that argument is that, in construing the Constitution, the default rule should be that words that might cover both foreign and domestic proceedings should be given such a universal (and extraterritorial) reading, unless the text specifically limits itself to proceedings in the United States. That novel approach reverses the general presumption that the Constitution does not have extraterritorial effect. See U.S. Br. 12-13. It also presupposes that the Framers drafted the Bill of Rights with both foreign and domestic proceedings in mind—a suggestion for which respondent and his amici offer no historical support.

In arguing that the term "any criminal case" in the Self-Incrimination Clause encompasses both domestic and foreign criminal cases, amici NACDL *et al.* rely (Amici Br. 5) on this Court's statement in *United States* v. *Gonzalez*, 117 S. Ct. 1032, 1035 (1997), that "the word 'any' has an expansive meaning." But the use of the word "any" in the Self-Incrimination Clause serves a more natural purpose than to sweep in criminal cases brought by foreign powers. The Fifth Amendment begins by requiring a grand jury indictment or presentment "for a capital, or otherwise infamous crime," thus limiting the requirement of an indictment to serious criminal cases. See *Mackin* v. *United States*, 117 U.S. 348 (1886); *Ex parte Wilson*, 114 U.S. 417 (1885). The Self-Incrimination Clause, in contrast to the Grand Jury Clause, is not so limited, as the phrase "any criminal case" makes clear. *McCarty* v. *Herdman*, 716 F.2d

361, 363 (6th Cir. 1983) ("[T]he language of the fifth amendment does not limit the privilege against self-incrimination to those charged with felonies. It has never been suggested that a defendant charged with a misdemeanor could be compelled to testify against himself."), aff'd *sub nom. Berkemer* v. *McCarty*, 468 U.S. 420 (1984). Neither the phrase "any criminal case," however, nor the textually similar reference to "all criminal prosecutions" in the Sixth Amendment, has any application beyond prosecutions brought in this country.

Respondent asserts (Resp. Br. 5) that "the Framers should have included the privilege in the Sixth Amendment" if they had intended the two to have the same application. We do not contend, however, that the rights provided by the Self-Incrimination Clause and the Sixth Amendment apply in precisely the same manner in the domestic context. The Sixth Amendment provides rights that a witness may assert only in his own criminal case. The Self-Incrimination Clause provides a right that may be asserted in any proceeding in which a witness would be compelled to give testimony that could incriminate him in a criminal case. U.S. Br. 14-15. Our point is that, in both instances, the criminal case must be a domestic one.

Respondent purports to find support for his position in *Counselman* v. *Hitchcock*, 142 U.S. 547 (1892). See Resp. Br. 5. *Counselman* did not address respondent's suggestion that, even if "all criminal prosecutions" in the Sixth Amendment refers only to domestic proceedings, "any criminal case" in the Self-Incrimination Clause encompasses foreign proceedings as well. And, as we explained in our opening brief (U.S. Br. 13-15), the Court has abandoned the portion of the *Counselman* analysis on which

respondent relies. As the Court has since recognized, a grand jury witness may assert the privilege against compelled self-incrimination not because a grand jury proceeding is a "criminal case," as *Counselman* reasoned, but because the privilege may be asserted in any proceeding, "civil or criminal, formal or informal, where the answers might incriminate [the witness] in future criminal proceedings." *Lefkowitz* v. *Turley*, 414 U.S. 70, 77 (1973).

2. Respondent does not take issue with our conclusion (U.S. Br. 16-17) that the Framers were not operating against any settled understanding that the common-law privilege against self-incrimination, as it had developed in England and the American colonies, would allow a witness to avoid testifying based on a fear of prosecution by an independent foreign government. Amici NACDL *et al.* argue (Amici Br. 8) that two pre-constitutional English cases (*East India Co.* v. *Campbell*, 1 Ves. Sen. 246, 27 Eng. Rep. 1010 (1749), and *Brownsword* v. *Edwards*, 2 Ves. Sen. 243, 28 Eng. Rep. 157 (1750)) "support application of the privilege to bar compelled self-incrimination under foreign law." But amici do not dispute that both cases involve dual court systems operating under the same sovereign. See U.S. Br. 17. Nor do amici offer any reason to suspect that the Framers were even aware of those cases, much less sought to extend their holdings to witnesses who feared prosecution by a independent foreign government. Indeed, when two English courts in the mid-19th Century considered whether the common-law privilege extended to witnesses who feared foreign prosecution, neither cited *East India Company* or *Brownsword* as pertinent to the issue. See *King of the Two Sicilies* v. *Willcox*, 1 Sim. (N.S.) 301, 62 Eng. Rep. 116 (1851); *United States* v. *McRae*, L.R.-3 Ch. App. 79 (1867).

3. Respondent argues (Resp. Br. 6-7) that this Court's decisions in *Malloy* v. *Hogan*, 378 U.S. 1 (1964), and *Murphy* v. *Waterfront Commission*, 378 U.S. 52 (1964), support the assertion of the privilege against compelled self-incrimination based on a fear of prosecution abroad. He relies principally on the fact that *Murphy* overruled prior decisions holding that a witness in a federal proceeding could not invoke the privilege based on a fear of state prosecution, and a witness in a state proceeding could not invoke the privilege based on a fear of federal prosecution, because the Fifth Amendment applied only when the federal government was *both* compelling *and* using a witness's self-incriminating testimony. See, *e.g.*, *Knapp* v. *Schweitzer*, 357 U.S. 371 (1958); *Feldman* v. *United States*, 322 U.S. 487, 489-494 (1944); *United States* v. *Murdock*, 284 U.S. 141 (1931); *Hale* v. *Henkel*, 201 U.S. 43, 69 (1906).

While respondent is correct in stating (Resp. Br. 6-8) that *Murphy* overruled those decisions, he is incorrect in implying that *Murphy* thereby requires the conclusion that the Self-Incrimination Clause is triggered by foreign criminal proceedings—which are brought by governments that are plainly not bound by the Fifth Amendment. In *Murphy* itself, the Court addressed only "whether one jurisdiction within our federal structure may compel a witness, whom it has immunized from prosecution under its laws, to give testimony which might then be used to convict him of a crime against another such jurisdiction." 378 U.S. at 53. The Court noted that there was an essential link between its rejection of the prior cases, which prohibited assertions of the privilege based on fears of

prosecution in another domestic jurisdiction, and its decision in *Malloy*, which applied the Self-Incrimination Clause to the States through the Fourteenth Amendment. The Court made clear that its decision was necessary to prevent a witness from being "whipsawed into incriminating himself under both state and federal law"—*i.e.*, being compelled to testify to federal crimes in state court and to state crimes in federal court—"even though the constitutional privilege against self-incrimination is applicable to each" as a result of *Malloy*. 378 U.S. at 55 (internal quotation marks omitted); see *id.* at 57 ("Our decision today in *Malloy* v. *Hogan*, *supra*, necessitates a reconsideration of [the single-sovereign] rule."); *Kastigar* v. *United States*, 406 U.S. 441, 456 n.42 (1972) (*Murphy*'s "[r]econsideration" of the single-sovereign rationale in the federal-state context "was made necessary by the decision in *Malloy*"). In contrast, when the United States seeks to compel a witness to give testimony that could incriminate him only in a prosecution brought by a foreign government, the Fifth Amendment privilege is not "applicable to each."[1]

Amici NACDL *et al.* argue (Amici Br. 19) that *Murphy* "made clear" that a Fifth Amendment violation occurs whenever a witness is compelled to give

[1] As we noted in our opening brief (U.S. Br. 22), the potential for "whipsawing" that concerned the Court in *Murphy* cannot exist in such circumstances, because the United States is not compelling the witness to give testimony that the Fifth Amendment would prevent the foreign government itself from compelling. Respondent rejects that point as "utterly absurd" (Resp. Br. 10 n.3), without confronting the difference between States, which are bound by the Fifth Amendment, and foreign governments, which are not.

self-incriminating testimony by a jurisdiction subject to the Fifth Amendment, "even if the potential using jurisdiction is not subject to the constitutional limitation." That question was not, however, presented in *Murphy*. To the contrary, the Court expressly declined to decide whether a violation of the Self-Incrimination Clause may occur at the "compulsion" stage as opposed to the "use" stage. See 378 U.S. at 57 n.6 ("Now that both [state and federal] governments are fully bound by the privilege, the conceptual difficulty of pinpointing the alleged violation of the privilege on 'compulsion' or 'use' need no longer concern us."). And, while the Fifth Amendment is doubtless aimed at preventing improper compulsion for the purpose of convicting a defendant in this country based on his own words, that does not mean that the compulsion alone works a violation; as the Court has observed, the privilege against compelled self-incrimination is "a fundamental trial right of criminal defendants" whose "violation occurs only at trial." *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 264 (1990).

Respondent also purports to find support in two pre-*Murphy* decisions of this Court: *United States* v. *Saline Bank*, 26 U.S. (1 Pet.) 100, 104 (1828), and *Ballmann* v. *Fagin*, 200 U.S. 186, 195-196 (1906). As we previously noted (U.S. Br. 18-19 & n.9), however, *Saline Bank* did not even mention the Self-Incrimination Clause. See 26 U.S. at 104. And in *Ballmann*, which involved a witness who was at risk of both federal and state prosecution, the Court recognized that the witness's fear of federal prosecution was sufficient, in itself, to support his assertion of the privilege. 200 U.S. at 195-196. Neither case contained any analysis of why the Clause, while not

(at that time) applicable to the States, might nonetheless be invoked by federal witnesses who feared state prosecution. See *Murphy*, 378 U.S. at 83-84 (Harlan, J., concurring) (discussing *Saline Bank* and *Ballmann*).

Respondent's amici, although not respondent himself, also rely (Amici Br. 17-18) on the English court's decision in *United States* v. *McRae*, *supra*. But amici do not explain why *McRae*, which involved the English common-law privilege, not the Fifth Amendment privilege, and which was issued some 75 years after the ratification of the Fifth Amendment, has any bearing on how the Fifth Amendment privilege should be construed. *McRae* is also distinguishable on its facts from this case. *McRae* was an attempt by a foreign government, the United States, to obtain evidence in an English court relevant to a pending prosecution in the United States. It was not a case in which England itself sought evidence from the witness in pursuance of its own law-enforcement interests. And, as we have previously noted (U.S. Br. 25-26), the English commentators did not read *McRae* as resolving the issue as definitively as amici suggest.[2]

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[2] The Court has not continued to embrace its earlier "observations" with respect to its precedents, once the Court has concluded that those observations were "mistaken." *E.g. Bennis* v. *Michigan*, 516 U.S. 442, 448-449 n.5 (1996). We submit that the *Murphy* Court's observations with respect to *Saline Bank*, *Ballmann*, and *McRae*—observations not essential to *Murphy*'s actual holding—were likewise mistaken for the reasons, among others, suggested by Justice Harlan in his concurring opinion in that case. See 378 U.S. at 81-82 n. 1, 83-84 (Harlan, J., concurring).

B. The Purposes Of The Self-Incrimination Clause Do Not Justify Its Extension To Fears Of Foreign Prosecution

1. Respondent relies (Resp. Br. 4) on what he considers to be the Self-Incrimination Clause's "predominan[t]" purpose of protecting "individual liberty." The Clause has been said to serve a variety of purposes. *Murphy*, 378 U.S. at 55. This Court has indicated, however, that the Clause was primarily designed to prevent "abuse [of] power" by the government, *Ullmann* v. *United States*, 350 U.S. 422, 428 (1956), and particularly the abuses of "the ecclesiastical courts and the Star Chamber" with which the Framers were familiar, *Doe* v. *United States*, 487 U.S. 201, 212 (1988). Presumably, if the principal purpose of the Clause were, as respondent suggests, to protect such interests as "the inviolability of the human personality" and "the right of each individual to a private enclave where he may lead a private life" (Resp. Br. 4, quoting *Murphy*, 378 U.S. at 55 (internal quotation marks omitted)), an individual could never be compelled to disclose information implicating himself in a crime. But this Court has made clear that such compulsion is permissible in the domestic context once the individual has been granted use and derivative-use immunity. *Kastigar*, 406 U.S. at 459 (concluding that use and derivative-use immunity is consistent with "the purpose of the Fifth Amendment privilege").

We do not deny, as respondent asserts (Resp. Br. 4), that the Self-Incrimination Clause also serves to protect individual liberty. But the Clause has never been construed to bar all forms of compulsion that might be said to infringe that value. For example,

when the government compels a suspect to give a blood sample, a handwriting exemplar, or an authorization to a bank to produce records of any accounts that he may have, the suspect may be producing evidence that directly conflicts with his own liberty interests. Such "compelled" evidence may even serve as the essential means of convicting him, where incriminating evidence could not be obtained from any other source. The Court has recognized, however, that those acknowledged intrusions upon individual liberty do not violate the Clause. See, *e.g.*, *Doe*, 487 U.S. at 209-219 (bank authorizations not testimonial); *Gilbert* v. *California*, 388 U.S. 263, 266-267 (1967) (handwriting exemplars not testimonial); *Schmerber* v. *California*, 384 U.S. 757, 760-765 (1966) (blood sample not testimonial). It is equally appropriate to recognize that the values underlying the Self-Incrimination Clause, profound as they may be, find constitutional protection only where there is an actual or prospective "criminal case" as that phrase is used in the Bill of Rights, *i.e.*, a domestic criminal prosecution.

2. Respondent asserts (Resp. Br. 9-10) that applying the Self-Incrimination Clause only to witnesses who fear domestic prosecution will create "incentives" for government "abuse" that are "mind boggling." But respondent offers no basis in law or experience to suppose that the United States or a State would improperly "abuse" a witness in order to obtain testimony that neither could use against him in a criminal prosecution. Indeed, because the government's interest is generally that a domestic judge or jury credit the witness's compelled testimony (*e.g.*, in a criminal prosecution against other persons or in a deportation proceeding against the witness himself),

the government has every incentive to assure that the witness is treated properly, so as to avoid any suggestion that his testimony is the product of improper tactics. And, as the Court has elsewhere noted, the Constitution provides various "other protections," aside from the Self-Incrimination Clause, "to prevent abusive investigative techniques." *Doe*, 487 U.S. at 214; *id.* at n.13 (noting limitations imposed by the Due Process Clause).

Respondent further contends (Resp. Br. 10) that applying the Self-Incrimination Clause only to witnesses who fear domestic prosecution will produce the "incongruous" result that foreign governments that "prohibit[] compulsion of testimony in their own courts" could nonetheless "accept[] compelled testimony and its fruits exported by the United States." The short answer is that our Constitution is not concerned with whether, or to what extent, other governments apply a privilege against self-incrimination in their own courts. See, *e.g.*, *Johnson* v. *Eisentrager*, 339 U.S. 763, 784 (1950); *Neely* v. *Henkel*, 180 U.S. 109, 122 (1901).[3]

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[3] It is questionable whether many governments would allow a witness in respondent's current position to assert a privilege against self-incrimination. As we previously observed (U.S. Br. 25-26), Great Britain allows the privilege to be asserted only by a witness who fears domestic prosecution. Under the Canadian Charter of Rights and Freedoms, only a criminal defendant cannot be compelled to testify. Any other person may be compelled to give self-incriminating testimony, although such testimony cannot be used against him in a later criminal prosecution. Canadian Charter of Rights and Freedoms, Pt. I, §§ 11(c), 13; Canada Evidence Act, R.S.C., ch. C-5, § 5 (1985). India similarly allows its privilege against self-incrimination to be asserted only by an individual who has been formally charged with a crime. Indian Const., Art. 20(3). In a number of other

C. The Extension Of The Privilege To Fears Of Foreign Prosecution Would Damage Domestic Law Enforcement

1. Respondent attempts (Resp. Br. 11-13) to minimize the harms to domestic law enforcement that would flow from extending the Fifth Amendment privilege to witnesses who fear foreign prosecution. It is not surprising, however, that the government has not accumulated the "hard evidence" that respondent demands (*id.* at 11) of the impact of such a construction of the Self-Incrimination Clause. No circuit had adopted that construction before this case. And, as we previously explained (U.S. Br. 34), international criminal activity, ranging from drug trafficking to white-collar crimes to political terrorism, is an ever-growing threat to the United States and the world community. The United States would be increasingly impeded in its law-enforcement efforts in the years ahead if individuals could avoid

countries, the privilege against self-incrimination appears to be available only to the accused in his own criminal prosecution. Even then the privilege is often not invoked for various reasons not applicable in the United States, including that the judge or jury may be allowed to draw adverse inferences from the accused's silence. See Rudolf B. Schlesinger, *Comparative Criminal Procedure: A Plea for Utilizing Foreign Experience*, 26 Buff. L. Rev. 361, 378-382 (1977); Jeffrey K. Walker, *A Comparative Discussion of the Privilege Against Self-Incrimination*, 14 N.Y.L. Sch. J. Int'l & Comp. L. 1, 19-24 (1993); Diane M. Amann, *A Whipsaw Cuts Both Ways: The Privilege Against Self-Incrimination in an International Context*, 45 U.C.L.A. L. Rev. (forthcoming 1998) (manuscript at 74-75, lodged with the Court by respondent). Other countries recognize no such privilege at all. See Amann, *supra* (manuscript at 102-103).

testifying about such crimes in this country based on a fear of prosecution abroad.[4]

Respondent contends (Resp. Br. 11) that few individuals will be able to assert the privilege successfully given the "heavy burden" of demonstrating a real and substantial fear of prosecution by a foreign government. But this case and *United States* v. *Gecas*, 120 F.3d 1419 (11th Cir. 1997) (en banc), petition for cert. pending, No. 97-884, suggest that the burden often is not particularly heavy. See *United States* v. *Gecas*, 830 F. Supp. 1403, 1407 (N.D. Fla. 1993) (observing that "the witness's burden is minimal"). The district courts in both cases found that the defendants faced a real and substantial fear of prosecution by Lithuania and Israel (and, in *Gecas*, Germany) notwithstanding all of the following: First, as

[4] The Court need look no further than this case, and *United States* v. *Gecas*, 120 F.3d 1419 (11th Cir. 1997) (en banc), petition for cert. pending, No. 97-884, for an illustration of the potential impact on domestic law enforcement of extending the Fifth Amendment privilege to witnesses who fear foreign prosecution. The government possesses certain documentary evidence indicating that respondent and Mr. Gecas assisted in the Nazi persecution of Lithuanian Jews and other civilians. But the government believes that it may not at this time have sufficient evidence, without these individuals' own testimony, to establish that they are deportable under the requisite "clear and convincing" standard. 8 U.S.C. 1229a(c)(3)(A) (Supp. II 1996). And that is so even if, as the court below suggested (Pet. App. 32a), adverse inferences may be drawn from their silence. The United States may thus have to tolerate the continued presence of these individuals (and many others) within its borders—notwithstanding Congress's clear intent that "participants in Nazi persecutions or genocide" be removed from the country, see 8 U.S.C. 1182(a) (3)(E), 1227(a)(4)(D) (Supp. II 1996)—if those individuals cannot be compelled to testify about their activities during World War II.

the courts acknowledged, neither Lithuania nor Israel had expressed any interest in prosecuting either defendant. Pet. App. 59a; *Gecas*, 830 F. Supp. at 1411 n.5. Indeed, Lithuania had not initiated any prosecution for World War II war crimes during the post-Soviet era,[5] and Israel had prosecuted only two individuals for World War II war crimes in its entire history, *Gecas*, 830 F. Supp. at 1408 n.3. Second, given that the defendants had refused to answer any questions about their World War II activities on Fifth Amendment grounds, the courts simply accepted the defendants' assertions that their testimony would implicate them in war crimes. See *Gecas*, 830 F. Supp. at 1407 (stating that "[i]n putting the witness to his burden [of proving a real and substantial fear of prosecution], the court must be careful not to force the witness to surrender the very protection which the privilege is designed to guarantee"). The courts were in no position to assess whether the defendants' activities did, in fact, constitute war crimes or, if so, whether the crimes were ones to which Lithuania or Israel would choose to devote its prosecutorial resources. See Pet. App. 59a-65a; *Gecas*, 830 F. Supp. at 1408-1410. Finally, as the courts recognized, the United States was not required to deport either

[5] Lithuania has since indicted the former chief and deputy chief of the Lithuanian Security Police, known as the "Saugumas," in Vilnius, which persecuted Jews and other civilians in collaboration with the Nazi occupation forces. Lithuania has not prosecuted other suspected Nazi collaborators, including members of the Saugumas, who are currently living in that country. See Richard C. Paddock, *Vilnius Turns Blind Eye to Its Nazi Past*, L.A. Times, Jan. 4, 1998, at A1. The United States believes that respondent was a member, although not a leader, of the Vilnius unit of the Saugumas.

defendant to Lithuania or Israel. If the defendants were deported, they would have a right to choose the country to which they were sent, although the Attorney General could veto that choice as "prejudicial to the United States" or the country could refuse to accept them. 8 U.S.C. 1231(b)(2)(A), (C) (Supp. II 1996); see Pet. App. 69a-70a; *Gecas*, 830 F. Supp. at 1410-1411.

Respondent also speculates (Resp. Br. 12) that compelling testimony from a witness who fears foreign prosecution "may be fruitless" because the witness may choose to lie or remain silent, thereby risking sanctions for perjury or contempt, rather than to testify truthfully. But a witness also has such incentives in the domestic context when his truthful testimony would subject him to adverse consequences other than a criminal prosecution. See, *e.g.*, *Piemonte* v. *United States*, 367 U.S. 556, 559 n.2 (1961) (witness may be compelled to testify notwithstanding fears of retaliation against himself and his family). The government has found the testimony of such witnesses to be sufficiently fruitful to pursue. Cf. *United States* v. *Grayson*, 438 U.S. 41, 50-52 (1978) (recognizing that even false testimony may have probative value).

Respondent suggests (Resp. Br. 12) that the United States' interests may be adequately served in many cases by questioning the witness only about his "domestic activities." Cf. J.A. 33-35 (respondent invokes privilege with regard to his domestic activities). But the foreign and domestic aspects of international criminal schemes are often inextricably intertwined. And respondent provides no solution for cases, such as this one, in which the United States'

interest is in removing an individual from this country precisely because of his conduct abroad.

2. Finally, respondent contends (Resp. Br. 13) that the government is improperly asking the Court to "balanc[e] * * * law enforcement interests against individual rights." That is not the case. Our submission is that the Self-Incrimination Clause, interpreted in light of its text, historical context, and principal purpose, protects witnesses only when the prosecution that they fear would be brought by the United States or a State. It is relevant to that inquiry whether the Framers contemplated that the Self-Incrimination Clause would operate as an absolute bar to the government's obtaining evidence needed for effective law enforcement. It was settled at the time of the drafting of the Self-Incrimination Clause that the government could overcome a witness's assertion of the privilege against compelled self-incrimination by a grant of statutory immunity. *Kastigar*, 406 U.S. at 445 & n.13. It reasonably follows that the Framers intended that the Clause be no broader than the government's power to grant immunity. As the Court has observed, statutory use and derivative use immunity protects the Fifth Amendment rights of witnesses at risk of domestic prosecution because it is "coextensive with the scope of the privilege." *Id.* at 449.

In *Murphy*, the Court recognized that permitting a federal witness to invoke the privilege based on a fear of state prosecution could not "prevent a proper federal investigation" because "the Federal Government could, under the Supremacy Clause, grant immunity from state prosecution." 378 U.S. at 71. Likewise, the Court in *Murphy* adopted an exclusionary rule in federal cases where a State has compelled

testimony under a grant of immunity in order to "permit[] the States to secure information necessary for effective law enforcement." *Id.* at 79. No such accommodation is possible if witnesses may assert the privilege based on fears of prosecution by a foreign government.[6] Rather, permitting a witness to invoke the privilege based on a fear of foreign prosecution would "prevent a proper federal investigation" because the federal government cannot grant immunity from the use or derivative use of testimony in a foreign prosecution.

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For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

APRIL 1998

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[6] Respondent argues (Resp. Br. 12) that, in *In re Erato*, 2 F.3d 11 (2d Cir. 1993), the privilege was "supplanted by immunity granted by the foreign government." *Erato* did not so hold. It held only that, because a foreign government had granted immunity to a witness, the court did not have to decide whether such immunity was a prerequisite to an order compelling testimony under 18 U.S.C. 6002. 2 F.3d at 14 n.2. In any event, our essential point is that it is not within the power of the United States to *require* a foreign government to grant "immunity"; nor would any such commitment be enforceable by the United States if the foreign government elected to use such immunized testimony in a prosecution in its own courts.